IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 883 OF 2000

1. Laxi Jahu Mahala, aged 40 years, Occ: Agricultural, R/o Sapada, Vadpada.]
2. Dhaku Jahu Mahala, aged 32 years, Occ: Agriculturist, R/o Dapada, Vadpada.] .. Applicant

Vs

1. U.T. of Dadra & Nagar Haveli, (To be served through the Special Public Prosecutor, High Court, Bombay).]
2. State of Maharashtra, (To be served through the office of the learned Public Prosecutor High Court, Bombay.)] .. Respondent

Mr. Abhaykumar Apte for the appellant-accused No.1.

Mr. C.M. Kothari for the appellant-accused No.2.

Mr. R.M. Agarwal, P.P., for the respondent No.1

Mrs. V.R. Bhosale, A.P.P., for respondent No.2-State.

CORAM: S.B. MHASE &
ANOOP V. MOHTA, JJ.

DATED: 22ND DECEMBER, 2004

ORAL JUDGMENT. : [Per Anoop V. Mohta, J.]

1. The appellants are charged, tried and convicted for the offence punishable under Section 302 r/w 341 of the Indian Penal Code (for short "IPC").

Therefore, this common Appeal by both the accused against the order of conviction.

2. The appellants are real brothers of the wife of the deceased Ramji. The property dispute between the deceased Ramji and the accused (brothers of Sakhu) was the alleged motive, as per the prosecution, which resulted into the death of Ramji. On 18th July, 1999, as complaint was lodged by the deceased, being holder of General Power of Attorney of his wife, the Police had called the deceased and also the accused in Karad Police Chowky. The deceased Ramji and his brother Dhakalbhai Dadhav(PW1), therefore, started from the village at about 7.30 a.m. on the scooter. At about 8.00 a.m., both the accused were standing on the road when the deceased and his brother reached near the Primary Health Centre, Dapada. Accused No.2 Dhaku was holding an axe while accused No.1 Laxi was having a stick. They stopped the scooter. Accused No.1 gave stick blows on the head of the deceased who was driving the scooter. The deceased fell down and shouted "Bachao, bachao." The accused prevented him from running away and threw him down. Accused No.2 gave the axe blow on the forehead, on the left side of the neck, on legs and also on the back of the deceased. The complainant, however, managed to run away in the jungle, inspite of their chase. The

complainant, thereafter, went to Silvassa Police Station in an autorickshaw, lodged the complaint and the same was registered. The investigation was accordingly moved. The Inquest Panchanama (Exhibit-20) and the Spot Panchanama (Exhibit-21) were drawn by PW9 Kamalbhai Patel. The scene of the offence was also drawn (Exhibit-22). The weapons found on the spot, clothes of the deceased, wrist watch with blood stains were seized. At the instance of the accused, another axe was also discovered and seized. The blood samples were collected from the accused and sent for analyzing, along with the incriminating seized articles. The complainant filed 7 X 12 extract and a copy of the Power of Attorney executed by Sakhu in favour of her deceased husband. After collecting the material evidence and due investigation, the chargesheet came to be filed. The charges were framed and the same were denied by the accused and, therefore, the trial commenced. The prosecution has examined 9 witnesses. No defence witness was examined by the applicants.

3. After taking into account the material placed on the record, including the evidence, the learned Judge held that on 18th July, 1999, at about 8.00 a.m. at Dapada Vadpada, in front of the Public Health Centre on the road, both the accused prevented the deceased Ramji

and complainant Dhakal and in furtherance of their common intention, assaulted the deceased by means of a stick and an axe with intention to cause murder and committed the murder.

4. Heard the learned counsel appearing for the appellants, as well as, the learned PP appearing for the State. The learned counsel Mr. Kothari, appearing for the appellant No.2, made his submissions based on the grounds as raised in the Memo of Appeal and, basically relied on **AIR 2002, S.C., 2707** [Mathura Yadav Vs. State of Bihar] in support of his submission that the evidence of the eye witness was not corroborated by the independent witnesses and especially when the alleged eye witness is a relative of the deceased. Therefore, this serious discrepancy, if taken note of, the accused are entitled to acquittal. He further relied on **AIR, 1971, S.C., 1586** [State of U.P. Vs. Jaggo] to support his contention that the witnesses, whose evidence is essential to unfold the prosecution case, must be examined, failing which, it seriously affects the truth of the prosecution case. The prosecution must prove the reason for not examining such witnesses. He lastly relied on **1999, All.Mh.L.R. (Cri.), 477** [Shri Cruz Pedro Pacheco Vs. State] in support of his submission that opportunity is a must, be given to the witness to

offer his explanation with regard to contradiction occurring in his own statement. Both the Advocates for the appellants, therefore, submitted to set aside the order of conviction and prayed for acquittal. The learned PP appearing on behalf of the prosecution relied on a catena of decisions, which are listed below.

(i) AIR 2003, S.C., 1164 [Amar Singh Vs. Balwinder Singh].

(ii) AIR 1974, S.C., 308 [Laxman Vs. State of Maharashtra].

(iii) AIR 2002, S.C., 382 [Majid Vs. State of Haryana] = 2001 AIR SCW 5175.

(iv) AIR 2003, S.C., 4664 [Raj Kishore Jha Vs. State of Bihar].

(v) AIR 2003, S.C., 4466 [Sohan Lal Vs. State of Punjab].

(vi) (2004) 4, LRI, 271 [State of Uttar Pradesh Vs. Sheo Sanehi & Ors.]

(vii) 2004, SAR (Criminal), 470 [Dani Singh & Ors. Vs. State of Bihar].

(viii) 2003 (2) UJ 1461 (SC) [Damodar Vs. State of Rajasthan].

(ix) AIR 2000, S.C., 2063 [Lakhan Sao Vs. State of Bihar] = 2000 AIR SCW, 1955.

(x) AIR 1945, Privy Council 118 [Mahbub Shah Vs. Emperor].

(xi) AIR 1996, S.C., 2905 [Behari Prasad Vs. State of Bihar].

(xii) AIR 1997, S.C., 768 [Rattan Singh Vs. State of H.P.]

(xiii) AIR 2003, S.C., 2855 [Dhirajbhai G. Nayak Vs. State of Gujarat].

5. The learned PP, in his submission in support of the judgments, contended that all the crucial and relevant witnesses have been examined and beyond doubt, proved the prosecution case. There was a motive. The appellants-accused with common intention, had committed the murder. Human blood of Group "O" of the deceased was found on both the sticks and on their shirts. These are additional corroborative circumstances, apart from the discovery of an axe at the instance of the accused No.2. The discrepancy, if any, in any way, nowhere affects the prosecution case, as the witnesses are "most natural, trustworthy and unbiased". He further relied on the statements of the accused given under Section 313 of the Criminal Procedure Code. He also relied on the medical evidence and other corroborative evidence in support of his submissions to maintain the order of conviction.

6. There is no serious dispute about the fact that the death of the deceased Ramji was homicidal. The Post Mortem Report, as well as, the evidence of Dr. Ramlal (PW2) has proved and corroborated the injuries and the cause of death i.e. due to shock and severe haemorrhage from multiple fractures and wounds. This witness has deposed that the external injuries Nos.1 and

4 are sufficient to cause death in ordinary course. The injury No.4 i.e. incised wound on the left side of the neck alone was sufficient to cause death in normal circumstances. Injury No.1 i.e. incised wound on the right side of the forehead alone was not sufficient to cause death. The external injury Nos.2 and 3 were also, by themselves, not sufficient to cause the death. The external injury Nos.1 and 4 could be caused by sharp cutting weapon like axe (article No.4). The injury Nos.2 and 3 could also be caused by an axe, but of a smaller size. He has answered in the cross-examination that none of the external injuries (1 to 10) could be caused by a stick because all the injuries were caused by sharp weapons. Now, therefore, the question is about the role played by the respective appellants, which resulted in to the death of the deceased Ramji.

7. As we have noted, the complainant PW1 - Dhakal was with the deceased Ramji on the scooter as a pillion rider. He has deposed that the deceased and the accused had cordial relations. The accused are brothers of Sakhu, wife of the deceased. Sakhu and the deceased had fenced the land by the barbed wire. The father of the appellants and Sakhu gifted some land to the wife of the deceased i.e. Sakhu and accordingly, the fenced land was recorded in the name of Sakhu in the revenue record.

As both the accused had damaged the fence, the complaint was lodged by the deceased. Therefore, the Police at Karad Police Outpost had called the deceased and the accused. This witness has further deposed that when they reached opposite Government Dispensary at Dapada at about 7.45 a.m., both the accused were standing on the road. Accused No.2 Dhaku was having a shawl on his person and an axe in his hand. Accused No.1 Laxi had a stick in his hand. Accused No.2 stopped the scooter, which Ramji was driving. Accused No.1 rushed and hit the deceased by means of a stick on his head from behind. The deceased Ramji fell down from the scooter. Accused No.2 gave one blow of axe on the forehead of the deceased. The deceased was screaming for rescue "bachao, bachao". This witness had seen one blow being given by the sharp side of the axe by accused No.2. After the blow of axe, this witness was frightened and, therefore, he ran away and had not seen anything thereafter. This witness has further deposed that he went to the Police Station in an autorickshaw and lodged the complaint at Silvassa Police Station. The statement of this accused was recorded on the next day of the incident. This witness had identified article No.4 i.e. the axe and article No.3 wooden handle of the axe. We have noted certain discrepancies and specially omissions in paragraph 7 and 8 of his deposition. This witness

has answered that he had told the Police that his brother was assaulted by axe on the left side of the neck, both the legs and back side of the body. He had only stated in the Complaint about accused No.2 Dhaku by an axe on the forehead. This witness has also answered in the cross-examination that he had not told that accused No.2 Dhaku was covering a shawl on his body. This witness was unable to support the prosecution case in respect of the motive. This witness had not stated before the Police that the incident might had been seen by some other persons. When this witness returned back to the place of occurrence along with the Police at about 11.00 a.m., he saw that one homeguard was present near the dead body. There was traffic round the clock on the road. This witness has answered that his brother received an axe blow while on the scooter, whereas in the statement he had mentioned that accused No.2 Dhaku gave an axe blow after he fell down on the ground because of the hitting by accused No.1 Laxi. This witness had no detail knowledge about the dispute in respect of the land in question. This witness has further stated that the statement of Sakhu was also recorded. PW1 has proved the FIR (Exhibit-10) and, therefore, the recitals in the FIR broadly corroborates the basic evidence led by this witness, as well as, the prosecution case. As noted, even if there are some

discrepancies or omissions in the testimony of this witness and based on which, the argument was made and even presence of this witness at the relevant time and place of the alleged occurrence was also doubted and agitated.

8. Here, it is necessary to refer to the basic principles relating to FIR and of the delay in lodging FIR has to be considered after taking into consideration the circumstance; the nature of the injury sustained, number of victims, efforts made to provide medical aid to them, the distance of the hospital and Police Station [Amar Singh (supra)]. The FIR under Section 156 of the Criminal Procedure Code is not substantial evidence. It is only information about the commission of the offence. It is not substantive evidence as the Police thereafter is required to investigate the offence itself [Sohan Lal (supra)]. The detail account of the incidence/occurrence even if not given in the FIR, no adverse inference can be drawn against the prosecution case for the omissions, specially when those omissions are of minor nature [Behari Prasad (supra)]. FIR cannot be expected to be a chronicle of every detail of what happened and/or not to be an exhaustive catalogue of the events which took place. The informer need not necessarily have the skill or ability to reduce the

details of the entire story, without anything missing therefrom. Some may miss even details in a narration. The concerned Officer may not take or would record the information in detail. Therefore, even if there are some omissions, it has to be considered along with the other evidence [Rattan Singh (supra)]. The non mentioning of the name of some of the prosecution witness or the accused, by itself would not be a suspicious circumstance or circumstance to disbelieve the contents of the FIR. The informant/complainant's mental condition cannot be overlooked at the time of the lodging of the FIR within a reasonable time after the occurrence, specially when the informant or the complainant are close relatives of the victim. The psychic trauma cannot be ignored [Dhirajbhai Nayak (supra)]. In view of the above settled proposition, we see there is no reason to disbelieve and/or overlook the FIR, as well as, the evidence of PW1 on the ground of some omissions and/or some discrepancy and/or detail in lodging the FIR. This witness has corroborated the prosecution case fully, including the respective role played by accused No.1 and accused No.2. The above principle is also reflected in the case cited by the appellants i.e. Shri Cruz Pedro Pacheco (supra). In the FIR of PW1, he has stated that Laxi had given stick blow and Dhaku had given deadly blow of axe on the

forehead, left side of the neck, both the legs and on the back side of the deceased and caused the death. This matches with the Post Mortem Report and the evidence of Dr. Ramlal PW-2.

9. The learned counsel appearing for the appellants basically relied on the aspects of the discovery and recovery of the two axes of different sizes on the spot. Article No.4 was identified and proved by PW1, whereas article No.9 was not proved through PW1. The said discovery was challenged on the ground of provisions of Section 27 of the Evidence Act. The said discovery was proved through a Panch witness - PW7. When this was shown to the Medical Officer (PW2), he has deposed that injury No.1 and 4 may be caused by this axe (article 4) but he had stated specifically that injury No.2 and 3 could be caused only by an axe of smaller size. As per the prosecution, only one axe was found on the spot. Therefore, recovery and/or discovery of another axe by the prosecution at this stage was taken as forefront shield by the counsel for the appellants to submit that the prosecution case is concocted and, therefore, this recovery and discovery raises various doubts to maintain the order of conviction. We are not convinced by this submission in this matter.

10. PW9 - Kamalbhai Patel, who was working as ASI at the relevant time, has supported the prosecution case and proved the same and specially the Inquest Panchanama. The blood stained clothes of the deceased and other articles, Spot Panchanama where the blood stained handle of the axe (article 4) and the axe (article 3) and the slipper of the deceased (article 1) were recovered. This witness had recorded the statement and arrested the accused on 21st July, 1999, and 25th July, 1999. Another axe (article 9) was attached under Section 27 of the Indian Evidence Act at the instance of accused No.2 on 31st July, 1999. This witness has recorded the statement of other witnesses Mohanbhai of Kalamdevi, Champakbhai of Amboli and Bal Rasli of Kaunza to whom the accused had made extra judicial confession after the incident as he had taken shelter in those respective places. The evidence of PW1 and PW9 have supported the prosecution story, even though PW3 Champak, PW4 Rasli and PW5 Mohanbhai did not support the prosecution case about the extra judicial confession and/or the respective visits by the accused to their places. The prosecution has proved, based on the evidence and other material on the record, that appellants, with common intention, had committed the murder. There is no substantial challenge to the basic

testimony of these witnesses by the accused-appellants. There remains no doubt in view of the seriological analysis report that on articles 2 to 7, 8 and 10, blood stains of "O" group of the deceased were found. On article 9, which was discovered at the instance of accused No.2, as recorded in the evidence of PW9, there were no blood stains. The recovery of another axe at the instance of accused No.2 by itself cannot be sufficient to discard the testimony of PW1, PW2 and PW9, which corroborates the assault by the accused with common intention by axe and stick, that resulted into the death of the deceased and later on, a seizure of the article Nos.3 and 4, apart from other medical evidence of Dr. Ramlal PW2. Mere minor discrepancies in size or length or width of the axe also, no way supports the submission of the defence counsel to discard the incident and the cause of death.

11. We have noted that the PW6 - Sakhu, the wife of the deceased and the sister of the accused also did not support the prosecution case. She has denied any dispute between the deceased and the accused about land and/or any complaint lodged by the deceased with the Police, but in the cross-examination, this witness has answered and admitted the existence of the barbed wire fencing on their land. She has expressed her ignorance

about the Police complaint lodged by the deceased, on her behalf, being the Power of Attorney holder. The learned Sessions Judge has rightly observed that this witness is unreliable and probably is supporting her brothers. The complaint lodged on the record of the Police Station, cannot be overlooked. This shows that there was property dispute between the parties. The complaint was lodged as the barbed wire fencing was destroyed by the accused. This shows the enmity between the accused and the deceased. This witness has gone to the extent of improving the statement for the first time in her evidence in the Court that when one boy from the village came to inform her about the death of her husband, Dhakalbhai (PW1) was in the house and thereafter she, along with Dhakalbhai and Kami had gone to Dapada and to Silvassa Police Station. She was unable to answer or give reason as to why she had not informed the Police about the death of the deceased, her husband. This witness is not an eye witness to the incident. It appears that this witness was examined to support the motive and other circumstances. Therefore, this witness, in no way, either destroys or supports the prosecution case. The appellants are also not benefitted by the evidence of this witness.

12. PW7-Raghu Holiya Patel is a Panch witness and

supports the prosecution case to the extent of recovery of the blood stained axe at the instance of the accused Dhaku, from the courtyard of the house.

13. PW8-Bhanabhai Chhibubhai Solanki, who was the Head Constable at Karad Police Outpost, has supported the prosecution case about application dated 17/7/1999, filed by the deceased, the husband of Sakhubai Ramji Dadhav along with the Power of attorney and 7 X 12 extract (Exhibit-37) in respect of the damage to the barbed wire fencing on 17th July, 1999. This witness has further deposed that he had met deceased Ramji and instructed him to remain present at the Karad Outpost, the next morning i.e. on 18/7/1999, the date of incident. This witness supports the prosecution case and destroys the evidence of PW6 (Sakhu).

14. Another argument, which was canvassed that there was no justification or explanation given by the prosecution for not examining the independent witnesses, which were available at the relevant time. Thus, the eye witness was not corroborated by the independent witness and this amounts to serious discrepancy and, therefore, the accused are entitled for acquittal. To meet this argument, reliance was placed on the Apex Court’s decision in the **State of U.P. and Mathura Yadav**

(supra). In the case of State of U.P. itself, based on the provisions of section 286 Cr.P.C., it is observed that all witnesses of the prosecution need not be called, but witnesses, whose evidence is essential to support the prosecution case is sufficient. In the present case, admittedly PW1 was an eye-witness even though he was related to the deceased Ramji. His presence on the spot cannot be said to be unnatural. PW8, the prosecution witness, has supported this fact that he had called the deceased on 18th July, 1999, at the Police Station. In the present case, therefore, merely because some other independent witnesses were not examined, that itself in no way destroys the prosecution case. It is settled that it is not the quantity of the witnesses which is essential, but the quality. In the present case, we are also of the view that the evidence of PW1 is reliable and trustworthy. The evidence of PW1 cannot be overlooked, as is sought to be contended, merely because there was dispute between the accused and the deceased in respect of the property in question and because PW1 is the brother of the deceased **[State of U.P. Vs. Sheo Sanehi, Dani Singh (supra)],** specially when the prosecution has brought on the record, all the material particulars, consistent with the prosecution case, through the other witnesses, by PW1, PW2, PW7 and PW9.

15. The statement under Section 313 of the Cr.P.C., as recorded in the present case, also supports the prosecution case. The Apex Court has already laid down that the examination of the accused under this provision is not an empty formality. The purpose is to bring to the notice of the accused, the implicating materials which is likely to be used by the prosecution against him. [Damodar (supra)]. In the present case, we have noted that the explanation, as given by the appellants, is not supporting their own case. They were only evasive replies.

16. After considering the material, including the role played by the respective accused and in view of the settled principle of law as reported in Dani Singh, Lakhan Sao, and Mehbub Shah (supra), in the present case, as we have noted, both the accused were standing on the road when the scooter in question came. They stopped the scooter. Accused No.1 gave the first blow. Accused No.2 later on gave axe blows. From the evidence, it is very clear that there was motive, as well as, common intention to assault the deceased. The participation by both the accused in the present case shows the common purpose and consensus of the minds of the persons participating in the criminal action to

bring about a particular result. The physical presence of both the accused cannot be overlooked. There was pre-arranged plan between the two. It is settled that the common intention pre-supposes prior consent. There is nothing brought on the record to show that both were not aware of each other's actions or intentions at the time of stopping the deceased and PW1 and/or hitting the deceased on his head by a stick and by an axe on his head, neck and other parts of the body. According to us, this case falls within the ambit of common intention and purpose as contemplated under Section 34 of the IPC. In view of this, we also are in agreement with the view taken by the learned Single Judge that both the accused had committed the murder with common intention.

17. For the reasons recorded above, we are of the view that there is no merit in the Appeal. The view taken by the learned Sessions Judge is within the framework of law and facts. In the present facts and circumstances of the case, therefore, we see no reason to interfere with the findings and conviction order passed by the learned Sessions Judge against both the accused is maintained.

18. The Appeal, therefore, is dismissed.

19. The appellant No.1 (accused No.1), who has been released on bail should be taken into custody to serve out the balance sentence.

[ANOOP V. MOHTA, J.] **[S.B. MHASE, J.]**

[srpasha@hc]